

Respondent requests that the Order be affirmed. Respondent contends claimant failed to provide timely notice of his alleged work-related injury and that claimant did not

have just cause for not providing notice within 10 days after the date of accident.¹ In addition, respondent asserts that the issue of whether claimant sustained an injury arising out of and in the course of his employment with respondent on April 1, 2009, is not before the Board and, therefore, the Board may not consider that issue. In its brief to the Board, respondent states:

Judge Moore found that Claimant sustained an injury by accident on April 1, 2009, and that Claimant failed to provide notice within 10 days of April 1, 2009. Claimant's position that he provided adequate written notice for a 7/29/09 repetitive injury pursuant to K.S.A. 44-508(d) is moot as it is based on a finding contrary to Judge Moore's Order, which is not an issue for consideration presently before the Board.²

The issues before the Board on this appeal are whether claimant provided proper notice of his work-related injury and whether his injury was a result of a series of events or a result of a single event.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

The claimant worked as a master welder for the respondent. His duties involved lifting and pulling. Claimant alleges a repetitive injury to his lower back with a date of accident of July 29, 2009.

On Friday, May 1, 2009, claimant visited his personal physician. Claimant presented with back pain, which he had experienced for the last month.³ Claimant did not mention the pain was related to work nor ongoing job duties. The physician opined the pain was most likely muscular in nature. Conservative treatment, including physical therapy, was recommended.

On Sunday, May 3, 2009, claimant sought treatment at the emergency room due to severe pain in his back and legs. Claimant advised the emergency room staff that his pain was related to an injury he suffered one month ago at work.⁴ Claimant was diagnosed

¹ See K.S.A. 44-520.

² Respondent's Brief at 9 (filed Feb. 15, 2010).

³ P.H. Trans., Cl. Ex. 1.

⁴ *Id.*

with back pain with radiculopathy. Claimant was prescribed pain medication and discharged.

The claimant attended physical therapy on May 7, 2009. During this visit claimant did not state a specific injury but he stated he felt as if he pulled a muscle at work and it had gotten worse over time.⁵

At the request of claimant's attorney, Dr. Pedro A. Murati examined and evaluated the claimant on September 23, 2009. Dr. Murati opined that claimant's current condition was a direct result of a work-related injury.⁶

Claimant's testimony as to the timing of events in April and May 2009 is confusing and inconsistent. Claimant alleged he notified Jeremy Danner (co-worker and lead person/supervisor), Glen Burton (lead person) and Randy Long (production supervisor) of his back injury.⁷ All three testified that claimant did not mention he was suffering from back problems as a result of his work.⁸ In addition, the date and time that claimant allegedly notified Mr. Danner and Mr. Burton are inconsistent as to the days and times claimant actually worked.

Jennifer Trezise, respondent's human resources manager, first became aware of claimant's alleged work-related injury when the hospital contacted her about performing a drug screen with regard to the injury claimant reported at his May 3, 2009 emergency room visit. Ms. Trezise subsequently contacted claimant to inquire about the emergency room visit and alleged work-related injury. Claimant told Ms. Trezise that his back complaints were not work related. He stated he was tired, had a pinched nerve and needed some time off.⁹

Claimant was terminated on May 15, 2009, for violation of the respondent's drug policy.

In finding the claimant did not give proper notice of his work-related injury to the respondent the ALJ stated:

⁵ *Id.*

⁶ *Id.*

⁷ P.H. Trans. at 11. Claimant later indicated he did not notify Mr. Long.

⁸ Danner Depo. at 4; Burton Depo. at 4; Long Depo. at 4.

⁹ P.H. Trans., Ex. 7 of Resp. Ex. A (Trezise Depo.).

The record before the court is confused and unclear about what Claimant contends happened, when it allegedly happened, and whether, and to whom, he gave notice of a claimed work-related injury. If the April 1, 2009 incident was not reported until some time in early May, notice was not timely. Claimant seeks to characterize his injury as a series to July 29, 2009, even though he did not work after May 15, 2009. He characterizes his injury as a series to avoid untimely notice issues. Evidence of a series of injuries is, however, lacking. On the contrary, Claimant advised Ms. Trezise that his complaints were not work-related at all. A finding of a series of injuries is dependent upon Claimant's credibility. Claimant's inability to relate a consistent story, or to even tell the same story twice, undermines his credibility.

The court finds and concludes that Claimant suffered an injury to his low back on or about April 1, 2009, as he related to medical personnel. The injury arose out of and in the course of his employment. The injury was not reported within 10 days, and is thus untimely. **K.S.A. 44-520**. Claimant has failed to establish just cause for enlargement of the notice period to seventy-five days. Claimant has failed to sustain his burden of proof that his present complaints relate to a claimed series of repetitive mini-traumas, as opposed to the natural and probable consequences of the unreported April 1, 2009 event.¹⁰

After considering the entire record and the parties' arguments, this Board Member finds no reason to disturb the ALJ's findings and conclusions in this regard.

Claimant asserts he gave notice of his work-related injury pursuant to K.S.A. 2008 Supp. 44-508(d).

K.S.A. 2008 Supp. 44-508(d) speaks to accidents that are a result of a series of events, repetitive use, cumulative traumas or microtraumas. The ALJ found the injury claimant sustained occurred as a result of a single accident on or about April 1, 2009. This Board Member will not disturb that finding. Claimant lacks credibility due to his confusing and inconsistent testimony. The medical reports of early May 2009 reflect claimant reported an accident causing injury on or around April 1, 2009. The statements to the medical personnel are the most credible and are sufficient to find and conclude the injury occurred as a result of a single event.

Consequently, K.S.A. 2008 Supp. 44-508(d) does not apply to the case at bar; rather, K.S.A. 44-520 is the applicable statute.

K.S.A. 44-520 states, in pertinent part:

¹⁰ ALJ Order (Jan. 15, 2010) at 2, 3.

44-520. Notice of injury. Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary.

For claimant to meet the requirements of K.S.A. 44-520, notice would have had to have been given by April 15, 2009. The earliest respondent knew of the accident was early May 2009, well beyond the 10-day period required by the statute. The statute also provides that the notice period may be extended to 75 days for just cause. Claimant has failed to establish just cause to extend the notice period to 75 days.

This Board Member affirms the ALJ's determination that claimant failed to provide timely notice of his accident.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹¹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, this Board Member affirms the January 15, 2010 preliminary hearing Order entered by ALJ Moore.

IT IS SO ORDERED.

Dated this ____ day of March, 2010.

CAROL L. FOREMAN
BOARD MEMBER

c: Melinda G. Young, Attorney for Claimant
Katie M. Black, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge

¹¹ K.S.A. 44-534a.